

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

BAD RIVER BAND OF THE TRIBE OF
CHIPPEWA INDIANS OF THE BAD RIVER
RESERVATION,

No. 3:19-cv-00602

Hon. William M. Conley

Plaintiff,

v.

ENBRIDGE ENERGY COMPANY, INC.;
and ENBRIDGE ENERGY, L.P.,

Defendants.

**BRIEF OF *AMICI CURIAE* MICHIGAN PROPANE GAS ASSOCIATION,
NATIONAL PROPANE GAS ASSOCIATION, AND WISCONSIN
PROPANE GAS ASSOCIATION IN SUPPORT OF DEFENDANTS'
OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR
INJUNCTIVE RELIEF**

INTEREST OF *AMICI CURIAE*

The Michigan Propane Gas Association (“**MPGA**”) is a trade and membership service organization that represents all facets of the propane industry in the State of Michigan, including before municipal and State government, as well as the Federal Government. MPGA’s mission is to promote the proper handling and use of propane, to work for a favorable environment for propane distribution and marketing, and to increase its application by demonstrating propane’s value as a clean energy source.¹ Currently, MPGA has 205 members, with 97 of those members providing retail propane service to Michigan homes and businesses.

The National Propane Gas Association (“**NPGA**”) is the national trade association representing the U.S. propane industry. Approximately 2,500 companies are currently members of NPGA, including 36 affiliated state and regional associations. NPGA’s members are primarily retail marketers of propane gas who deliver the fuel to the end user, but other members of NPGA include propane producers, transporters, and wholesalers; manufacturers and distributors of associated equipment, containers, appliances, and trucks; fabricators of propane gas cylinders and tanks; and service providers of all types.²

The Wisconsin Propane Gas Association (“**WPGA**”) is a trade and membership service organization providing services that communicate with propane marketers, suppliers, builders, and consumers throughout the state of Wisconsin. WPGA’s primary purpose is to promote awareness and the growth of propane usage as a safe and reliable source of energy.³ WPGA currently has 227 members, with 156 of those members providing retail service to Wisconsin homes and businesses.

¹ See <https://mipga.org>.

² See <https://www.npga.org>.

³ See <https://wipga.org>.

MPGA, NPGA, and WPGA (collectively, the “**Propane Associations**”) represent individuals and businesses that are primary users of propane carried through Line 5, and they respectfully submit this brief to emphasize the critical role the Line 5 pipeline plays in ensuring the safe and reliable distribution of propane, and to address the impacts that the shutdown sought by the Band would have on those who depend upon propane. As discussed in more detail below, the injunctive relief sought by the Band would have significant consequences for households, businesses, and industry in Michigan, Wisconsin, and the broader region, such that shutting down Line 5 now would not serve the public interest.

ARGUMENT

I. Line 5 provides an essential supply of propane.

Line 5 supplies a significant portion of an essential supply of propane used by the commercial, industrial, agricultural, and residential sectors in the State of Michigan, the State of Wisconsin, and the broader region. In 2021, Michigan consumers used approximately 522 million gallons of propane, making Michigan the second largest propane-using state in the United States.⁴ Michigan citizens are the largest consumers of residential propane in the United States year after year. A 2019 analysis of the Michigan energy infrastructure and operations by the Michigan Public Service Commission indicates that more than 320,000 primary residences rely upon propane for space heating, water heating, cooking, and other applications, including more than 20,000 households in Michigan’s Upper Peninsula.⁵ Wisconsin citizens are also large consumers of residential propane. In fact, in 2021, only Michigan used more propane for

⁴ Propane Education & Research Council, *Annual Retail Propane Sales Report* (2021).

⁵ Michigan Public Service Commission, *Michigan Statewide Energy Assessment* (Sept. 11, 2019), at pp. 121, 131–132, <https://tinyurl.com/2p9yzt9k> [hereinafter, “MPSC Report”]. When considering non-primary residences such as cottages, that number jumps to over 600,000.

residential heat than Wisconsin, and more than 260,000 primary residences in Wisconsin rely upon propane for space heating, water heating, cooking, and other applications.⁶

Line 5 transports approximately 540,000 barrels a day of light crude oil and natural gas liquids. The major portion of the natural gas liquid stream is composed of propane.⁷ Line 5 is connected to a fractionator in Rapid River, Michigan, which removes propane from a stream of natural gas liquids and returns the remaining natural gas liquids to the pipeline. The Rapid River facility is estimated to produce approximately 84,000 gallons of propane per day (with the capacity to produce 315,000 gallons per day), with annual production of 30.6 million gallons.⁸ The propane removed in the Rapid River facility is then distributed to heat homes and power industry in both Wisconsin and Michigan.⁹

After Rapid River, the natural gas liquid stream continues to Sarnia, Ontario, where fractionators again remove propane. The Sarnia facility has the capacity to produce 4.4 million gallons of propane per day.¹⁰ A significant portion of the propane removed in Sarnia returns to Michigan's Lower Peninsula,¹¹ and the Propane Associations understand that some reaches markets as far away as Indiana, Ohio, New York, and Virginia. Propane from Sarnia also supplies virtually all of the propane consumed in Ontario.¹² In addition, a fractionator in Superior, Wisconsin has the capacity to produce 420,000 gallons of propane per day.¹³

⁶ MPSC Report, at p. 132. When considering non-primary residences such as cottages, the number increases to over 460,000.

⁷ Expert Report of Neil K. Earnest, May 27, 2022, Doc. No. 262, at 15 [hereinafter, "Earnest Report"].

⁸ MPSC Report, at p. 129.

⁹ *See id.*

¹⁰ *Id.*; Plains Midstream Canada, *Michigan and Plains – Propane Overview* (Sept. 2019), at p. 4, <https://tinyurl.com/3jrr9t9y> [hereinafter, "Plains Propane Overview"].

¹¹ Earnest Report, at p. 19.

¹² *Id.* at pp. 16–17.

¹³ Plains Propane Overview, at p. 4.

The Sarnia fractionator is responsible for providing approximately 56% of the propane supply to Michigan's Lower Peninsula, and the Rapid River facility is responsible for providing most of the propane supply for Michigan's Upper Peninsula.¹⁴ The Superior fractionator is also responsible for supplying approximately 7% of the propane in Wisconsin and Minnesota, and a much higher percentage of the supply to northern Wisconsin and Minnesota.¹⁵ The Propane Associations understand that shutting down Line 5 would result in the closure of the fractionators in Superior and Rapid River, and that the operations in Sarnia would be substantially curtailed.¹⁶ Thus, Line 5 is essential to providing propane to meet the needs of citizens in Michigan, and the broader region.

II. The injunctive relief sought by the Band is not in the public interest.

Based on a fundamental misapprehension of how the propane industry operates, the Band incorrectly argues that the public interest will be served by the requested injunction and the economic consequences of shutting down Line 5 would not be substantial. (*See* Doc. No. 629, at 18.) With respect to propane specifically, the Band suggests that a shutdown of the pipeline now will not affect the supply of propane to residential users because the heating season is over, and the Line 5-produced propane can be replaced by rail before the next heating season begins in October. (*Id.* at 20–21.) This assertion is false.

Shutting down the pipeline now would have significant impacts on the ability to meet the needs of consumers who rely on the supply of propane made available by Line 5. Propane is a

¹⁴ Earnest Report, at pp. 17–18, 19.

¹⁵ *Id.* at p. 16.

¹⁶ The Rapid River and Sarnia facilities rely on Line 5 for their natural gas liquids feedstock, while the Superior fractionator is dependent upon Line 5 because it is the means by which the fractionator disposes of unneeded butanes following the extraction of propane from the natural gas liquid stream. *Id.* at 15–18.

byproduct of natural gas processing and crude oil refinement, so meeting consumer needs when demand increases is not a matter of simply increasing propane production volumes. While the heating season may be over until October and propane usage may decline over the summer months, propane production that is made possible by Line 5 continues during the warm weather months. Throughout the spring and summer, the fractionators in Superior, Rapid River, and Sarnia continue to operate, and continue to produce substantial volumes of propane. Even though the demand for propane decreases during the summer months, to prepare for the winter heating season and ensure the safe and reliable distribution of propane when it is needed, retailers and propane marketers rely on storage.

Michigan has approximately 580 million gallons of underground storage capacity for hydrocarbon gas liquids, such as propane.¹⁷ The State is unique in its ability to use repurposed salt caverns for storage. In addition to the underground storage, propane is stored in aboveground bulk storage tanks, as well as residential customer propane tanks.¹⁸ Propane storage volumes are at their low point at the end of the winter heating season. Starting in April and throughout the summer, propane storage is built up to prepare for seasonal heating demands. The volume of propane being stored generally peaks in September or October, after which demand increases as temperatures cool. In Michigan, the average peak storage volume from 2018–2022 totaled approximately 236 million gallons of storage, while the low point occurred in March, with an average of approximately 40 million gallons in storage.¹⁹

¹⁷ MPSC Report, at p. 13, 128.

¹⁸ *Id.* at 126–127.

¹⁹ U.S. Energy Information Administration, *Michigan Stocks at Refineries, Bulk Terminals, and Natural Gas Plants of Propane*, <https://tinyurl.com/yckc6aun> (last visited May 16, 2023).

Because the demand for propane is seasonal, storage of propane is essential to managing supply and ensuring that it is available to consumers when it is needed most. Storage of propane also helps counter price volatility. In fact, the State of Michigan has consistently encouraged residential propane customers fill their tank in the summer and fall, when propane is typically less expensive. Without the reserve stores built up over the summer, it would be difficult—if not impossible—to effectively meet needs of propane consumers in the winter months to come. In Michigan in particular, where a significant percentage of households that rely on propane to heat their homes receive propane supplied by Line 5, a shutdown of the pipeline would create significant hardship.

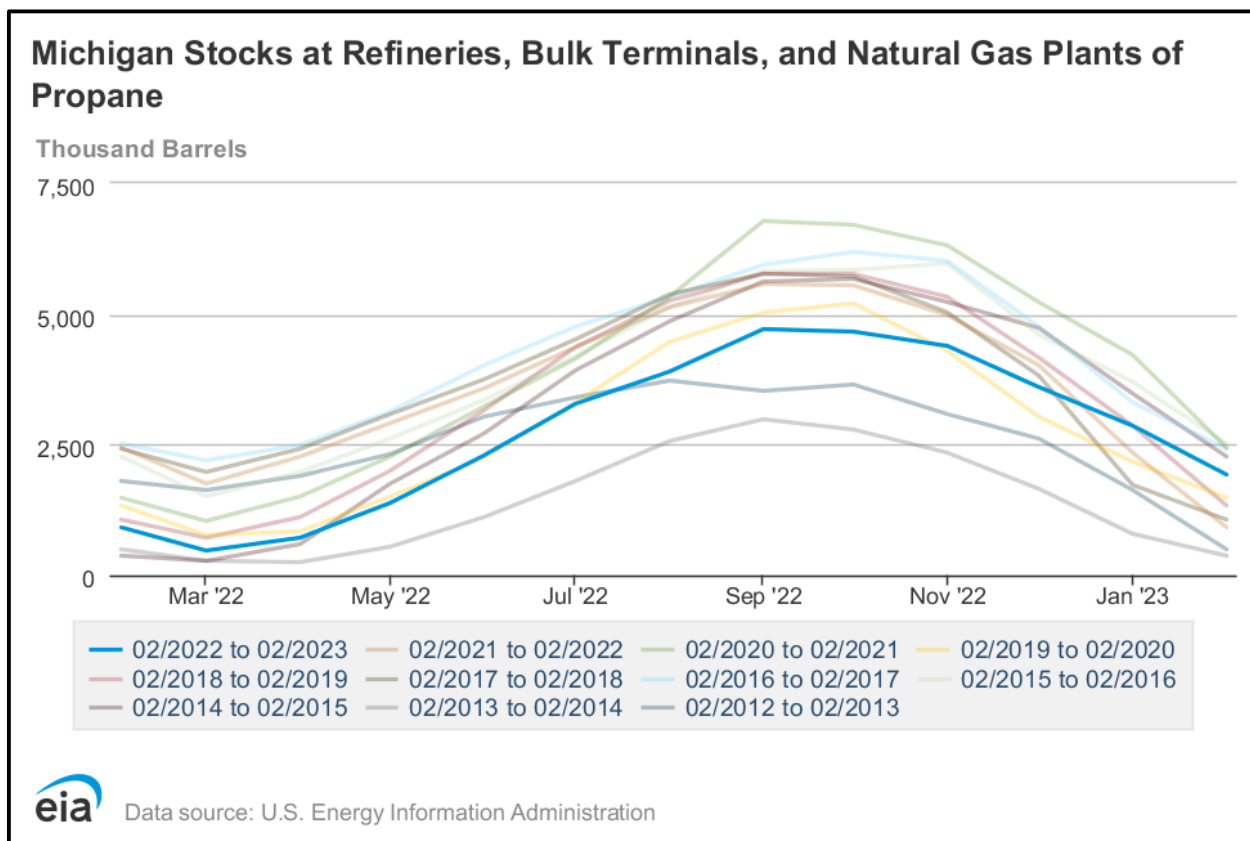
Thus, the Band’s assertion that an immediate shutdown of Line 5 will not have substantial economic impacts because the winter heating season is over and infrastructure needed to transport propane by rail can be put in place “within a few months” is, quite simply, wrong. Even assuming that a transition to delivery of propane by rail could be accomplished, the Band acknowledges that this would take months. (*See* Doc. No. 629, at 20.) During that time, the fractionators in Superior and Rapid River would no longer be operating, the Sarnia fractionator operations would be significantly limited, and those facilities would not be producing propane to help replace the depleted storage volumes for use when it is needed.

Data from the U.S. Energy Information Administration shows that in March 2022, Michigan propane stocks at refineries, bulk terminals, and natural gas plants totaled 476,000 barrels (less than 20 million gallons).²⁰ By September 2022, propane stocks had increased to 4,706,000 barrels (nearly 200 million gallons)—almost a tenfold increase.²¹ This is not an

²⁰ *Id.*

²¹ *Id.*

anomaly. As shown below, each year, the amount of propane in storage in Michigan increases dramatically from April to September—months during which propane production made possible by Line 5 would cease if the Band’s request for an injunction were granted.



Contrary to the Band’s assertion, shutting down Line 5—even in the summer months—would have significant, far-reaching impacts on propane customers in Michigan and the broader region, including hundreds of thousands of families who rely on propane to heat their homes. The storage of propane during the summer is what makes it possible to meet winter demands. Propane storage also provides energy security, helps insulate consumers from price volatility, and mitigates risks from weather-related energy emergencies and other supply disruptions, including propane rejection by refineries, potential railroad embargoes from Canada, export pressures, agricultural needs, and extreme weather events such as a polar vortex. Failing to

secure the volume for storage provided by Line 5 will create an unnecessary and unacceptable risk for Michiganders and citizens of other states who rely on propane storage in Michigan.

As the Court previously noted, in deciding whether to issue an injunction, “a federal district court must consider whether: (1) an injunction is necessary to prevent irreparable harm; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) the balance of hardships between the plaintiff and defendant; and (4) the public interest would not be disserved by a permanent injunction.” (Op. and Order, Sept. 7, 2022, Doc. No. 360, at 40) (quoting *Liebhart v. SPX Corp.*, 998 F.3d 772, 779 (7th Cir. 2021)).) In declining to issue a permanent injunction immediately shutting down Line 5, the Court in its September 7, 2022, opinion noted that “genuine disputes of material fact exist regarding the fourth factor: the public interest.” (*Id.* at 41.) In particular, Enbridge and several *amici*—including the Propane Associations—raised significant concerns regarding the widespread economic consequences that would result from an immediate shutdown of the pipeline. (*Id.*) The Court also found that “there is little question that an immediate shutdown of the pipeline would have significant public policy implications on the trade relationship between the United States and Canada.” (*Id.*)

The same concerns that led the Court to decline to order an immediate shutdown of Line 5 still remain. Further, the fact that the winter heating season is over will not alleviate the dramatic impact that shutting down Line 5 would have on the production and distribution of propane. Line 5 provides transportation for critical energy services in Michigan and the region, and is essential to providing propane to meet the needs of Michigan citizens. Shutting down the pipeline—including during the summer months when reserves of propane are being stored to meet the impending needs of hundreds of thousands of households and businesses—is not in the public interest.

CONCLUSION

The Court should deny Plaintiff's emergency motion for injunctive relief.

Respectfully submitted,

Dated: May 16, 2023

/s/Margaret C. Stalker

Daniel P. Ettinger (MI Bar No. P53895)

Margaret C. Stalker (MI Bar No. P76755)

WARNER NORCROSS + JUDD LLP

150 Ottawa Avenue NW, Ste. 1500

Grand Rapids, MI 49503

616.752.2000

dettinger@wnj.com

mstalker@wnj.com

*Attorneys for Amici Curiae Michigan Propane Gas
Association, National Propane Gas Association,
and Wisconsin Propane Gas Association*

#28536726